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In The

Supreme Court of the United States

FEDERAL EXPRESS CORPORATION,

Petitioner,

v.

PAUL HOLOWECKI, *et al.*,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

BRIEF OF RESPONDENTS

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QUESTIONS PRESENTED

1. Whether the procedural regulation of the Equal Employment Opportunity Commission under the ADEA, 29 C.F.R. § 1626, which provides that the first writing filed by a potential plaintiff with the Commission that identifies the parties and the general nature of the discrimination is controlling on the question of when a charge is filed?

2. Whether the Commission's failure promptly to notify the employer that a charge has been filed delays or diminishes the charging party's right to bring and prosecute a private suit to vindicate her claims under the ADEA?

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OPINIONS BELOW AND JURISDICTIONAL STATEMENT

Respondents accept as correct the Petitioner's Statement of the Opinions below and the Jurisdictional Statement.

STATUTE AND REGULATIONS INVOLVED

Respondents note that Section 7(d) of the Age Discrimination in Employment Act (the "ADEA"), 29 U.S.C. § 626(d) is involved, as stated by the Petitioner, but they believe that Section 7(c) is also involved, and that Section 9 of the ADEA, 29 U.S.C. § 28 is also involved, but is not included in the Joint Appendix. That Section states in relevant part:

> In accordance with the provisions of the Administrative Procedure Act, the Equal Employment Opportunity Commission may issue such rules and regulations as it may deem necessary or appropriate for carrying out this chapter . . .

The Regulation of the Commission Under the ADEA entitled "Procedures" is set forth in part in the Joint Appendix at 350-353.

STATEMENT

1. The Basic Facts.

Federal Express Corporation ("Federal Express") is a corporation engaged in the pick-up and delivery of letters and small packages the next day by ground and air. Federal Express has thousands of couriers who drive small trucks and pick-up and deliver packages throughout the United States, most of which are carried by airplane and are to be delivered by 10:30 a.m. the next morning.

Respondents are fourteen current or former couriers of Federal Express employed in California, Florida, Illinois, New York, New Jersey, Michigan and other states, who have more than ten (10) years of experience as couriers of Federal Express and were over age 40 as of early 2002. JA 19-20.

Respondents Kennedy, McQuillan, Robertson and other couriers of Federal Express had filed formal charges and other writings with the Equal Employment Opportunity Commission (the "Commission") or authorized state or local agencies from 1997 through 2001 in which they allege that Federal Express has engaged in age discriminatory practices against experienced older couriers in favor of younger, less experienced couriers, and that the practices were continuing. JA 96-109; 119-162.

A. The Charges of McQuillan and Robertson. In his charge, McQuillan, born in 1955, stated that he had been employed by Federal Express as a

courier in Hicksville, New York for more than 14 years and that Federal Express terminated his employment on March 31, 1998, and told him it was because of unsatisfactory performance. He stated that in fact he had always performed satisfactorily, and that Federal Express had "initiated a program that was supposed to be an incentive bonus plan" . . . but that the program "eventually became minimum standards . . . which were enforced more stringently on senior employees." JA 96-99.

Respondent Robertson had worked for Federal Express for approximately 16 years in Illinois, until September 8, 2000, when Federal Express terminated his employment while he was 40 years old. On December 1, 2000, he filed a formal charge of discrimination (EEOC Form 5) with the Illinois Dept. of Human Rights that was cross filed with the EEOC, in which he alleged the facts set forth above. He verified the allegations "under penalty of perjury." JA 101-103.

EEOC sent plaintiff Robertson a right-to-sue letter dated April 25, 2001. JA 102-103. But according to Robertson's Declaration, although he twice advised the postal services of the changes of address, he did not receive that letter in 2001, but instead wrote again to EEOC in January or early February, 2002 to ask for the current status of the charge. EEOC responded only by sending him a copy of its letter of April 25, 2001. He received the letter shortly after February 2, 2002. JA 263-264.

This suit was filed by Respondents McQuillan, Robertson and Kennedy and eleven other couriers of Federal Express on April 29 or 30, 2002, more than 110 days after Robertson's formal charge was filed with the Commission on December 1, 2000, and less than 90 days after he received the right to sue letter. JA 19.

B. The Kennedy Administrative Filing. On December 3, 2001, Respondent Patricia Kennedy filled out and signed allegations that Federal Express had discriminated against her and other older couriers because of their age in a detailed, single-spaced "AFFIDAVIT" dated December 3, 2001. JA 266-274. She sent the affidavit and a fully executed intake questionnaire to EEOC on or before December 11, 2001. *Id.*

Her Affidavit asserts that "FedEx through its Best Practices Pays Program has targeted myself and others . . . have and still are discriminating against me because of my age," that "I know of several older couriers who were fired and/or constructively terminated as a result of these BPP and procedure changes. I don't know of a single younger courier who lost their job because of such policies." JA 268. She continued: "Every year my employer's Survey Feedback action or SFE promises so long as I do a good job I'll always have a job! . . . my company has through its BPP practices completely polluted the methods of . . . defining what is a 'good job' . . . that older employees like myself no longer know if we even will have a job tomorrow . . . " JA 268. "Management's purpose is

clear; they want us to see the disparaging treatment and become so disgusted we quit." JA 271-272. She continued (JA 273):

> Federal Express does not want us pre-1988 senior employees to continue our employment lest they will have to pay our retirement health benefits if we can complete 10 years of continuous service between age 45 and 55. Please force Federal Express to end their age discrimination plan so we can finish our careers absent the unfairness . . .

In the same filing, Respondent Kennedy answered fully and executed an EEOC Questionnaire [Form 283] in which she asserted "age discrimination" by employer Federal Express in the names asserted in her Affidavit. JA 265-266.

That EEOC Form 283 she signed states: "Normally your identity will be disclosed to the organization which allegedly discriminated against you," and asks "Do you consent or not consent to such disclosures?"

Respondent Kennedy checked the "consent" box "yes" to indicate her consent that the Commission provide her identity to her employer, Federal Express, and on December 3, 2001 she signed the document. JA 265 (two pages, pullout). She checked "no" under the box that asked if she had sought assistance about her allegations from an attorney or other source. *Id.* She executed and filed the same form on February 3, 2002. *Id.*

C. Earlier Allegations of Age Discriminatory Practices By Other Couriers. The Respondents in this case were not the first couriers to advise EEOC of their belief that Federal Express was engaging in age discrimination against its older, senior couriers. Jack Hainline filed such a charge with the Tampa Office of EEOC against Federal Express (#151 95 1501) in 1995, and received a right to sue letter dated June 26, 1996. JA 107-109.

In early May 1996 courier Gerald Freeman complained of age discrimination within Federal Express in a letter to Mr. Chan, Managing Director of the Southern Division. JA 215-217.

In a letter to Freeman dated May 16, 1996 sent by overnight delivery, Mr. Chan stated that "I would like to address the issue of age discrimination . . . " but because of Freeman's "refusal to utilize the internal EEO process, I am setting that issue aside." JA 222-223. He rejected Freeman's apparent claim that younger and newer couriers were given the earlier start times, and advised Freeman of his right to proceed under Step II of the Guaranteed Fair Treatment Procedures of Federal Express. JA 223-224. Mr. Chan sent copies of his letter to the Vice President of the Southern Division and the Senior Vice President for Domestic Operations at Federal Express Headquarters in Memphis. JA 224-225.

By letter of May 22, 1996, Mr. Freeman wrote Mr. Scott Bunker that "Mr. Chan's response to my

GFT served as a reminder that the problem (self-regulation/investigation) is not a personnel problem but rather it's a system failure . . . " JA 227-229.

On July 8, 1996, Freeman filed a formal charge of age discrimination against Federal Express with the Clearwater Human Relations Department. JA 150-152. In 1997 and in early 1998 four other couriers filed similar age discrimination charges against Federal Express. (JA 155-157, 160-162, 170-172 and 175-177). Charging Party Maccia also filed his Affidavit with the Commission (JA 230-239):

> "These changes were orchestrated by Federal Express Corporate Headquarters in Memphis, Tennessee to target their older work force, nationwide! No matter where my travels, in speaking with other Federal Express employees . . . in . . . [twelve states listed] . . . ALL displayed the same frustrations with the harassment tactics of management toward them and other senior employees. It's obvious Federal Express' goals are to reduce their operation cost, rightly so, but not at the expense of their aging workforce . . . "

That affidavit also refers to Survey Feedback Action which, in its annual survey of employee attitudes, asks "CAN BE SURE OF A JOB IF I DO GOOD WORK" in Number 15. JA 238. Maccia alleged "I know that I have performed a good job up until now, however, but . . . Every employee 40 years old or older with 10 or more years' service are being focused on by management . . . aging and senior employees' rights

were violated by management." JA 238-239. The EEOC issued right to sue letters to the five charging couriers; Freeman, Maccia, Clausnitzer, Creamer and Krolman, in August and September 1999. JA 153-154, 158-159, 166-169, 173-174, 178-179.

Those five couriers, plus Wayne C. Tate, brought suit *pro se* to enforce their rights under the ADEA on October 26, 1999. *Freeman et al. v. Federal Express Corp., et al.*, 99-CV-2466. They alleged that Federal Express follows a nationwide practice of age discrimination against its older couriers, and the docket shows "CLASS ACTION COMPLAINT." JA 115. On January 27, 2000, the six Plaintiffs in that suit filed a Motion for Class Certification. JA 118. That motion was stricken by order of February 3, 2000 and the complaint was dismissed without prejudice. Plaintiffs were given 20 days within which to file an amended complaint on September 25, 2000. JA 131. A timely motion to reconsider was denied on October 16, 2000, and Freeman, et al. filed a timely motion of appeal on October 16, 2000, and Freeman et al. filed a timely motion of appeal on October 24, 2000. JA 134. On February 20, 2001 the district court entered an order setting March 9, 2001 as the date for the Plaintiffs to file an amended complaint. JA 140.

On March 6, 2001, Plaintiffs, represented by counsel, filed an Amended Complaint for the five original plaintiffs in that case and added ten (10) additional plaintiffs including Respondents Kubicki, Lewis, McQuillan, Moncalieri, Mutchler, Nelson and

Tucker. JA 142-143. That suit was closed administratively on March 28, 2002. JA 147.

2. Proceedings in this Case in the District Court Below.

In their Class Action Complaint filed on April 30, 2002, the fourteen Respondents allege that they are or were employed by Federal Express as couriers in the United States for ten (10) years or more and that they were age 40 and older, and that they "bring this suit on behalf of themselves and similarly situated Federal Express couriers." JA 20. They allege that Federal Express encourages managers and other supervisors to target older couriers for discipline and termination, and particularly to target older couriers who had been injured on the job or otherwise that required absences for medical reasons, and that Federal Express gave younger couriers preference over older couriers in starting times, overtime assignments and route assignments. JA 20-26.

The Complaint alleges that Federal Express engaged in a pattern or practice of employment practices that discriminate against older couriers and in favor of younger couriers in nine stated ways, and that such discriminatory practices have become the rule rather than the exception, and that such practices are not consistent with business necessity. JA 23-27.

The Complaint also alleges that Federal Express was on notice at all times since May 1995 of the

allegations of age discrimination in employment against older couriers, and that "Some of the Plaintiffs timely notified the EEOC of the discriminatory practices more than 60 days before this date"; that is, more than 60 days before April 30, 2002. JA 28-29. The Complaint further alleges in Count II that age discriminatory practices of Federal Express "are unlawful" under the laws of New York and "are also unlawful in California, Florida, Michigan and New Jersey . . . " and in other states. JA 31-32. Federal Express did not file an Answer. JA 1-2.

On July 16, 2002, Petitioner Federal Express filed a motion to dismiss the complaint under Rule 12(b)(6), supported by an Affirmation by its New York attorney, and sought payment of its costs and reasonable fees "for having to bring this motion and defend this frivolous lawsuit." JA 2. That filing was approximately 78 days after suit was filed. Federal Express also filed a Declaration of its Senior Attorney with eight exhibits in support of the motion to dismiss. JA 3 and JA 59-63, Exhibits at JA 64-106.

Respondents Holowecki et al. filed a timely memorandum of law in opposition to the motion and a Declaration of Respondent George Robertson. JA 3-4, and JA 263-264. Among the Exhibits filed by Respondents were an Intake Questionnaire and Affidavit of Freeman dated June 6, 1996 and an Affidavit of Maccia, and the fully answered Intake Questionnaire of Kennedy JA 265 (two pages) and her Affidavit signed and notarized on December 3, 2001. JA 266-274.

Kennedy's formal charge (EEOC Form 5) was executed on May 30, 2002. JA 275.

On Aug. 20, 2002, Federal Express filed its Reply Memorandum with a "Supplemental Declaration" of its attorney, in support of its motion to dismiss under Rule 12(b). JA 278. In its Reply Memorandum, Federal Express recognized that this Court, in *Edelman v. Lynchburg College*, 122 S. Ct. 1145 (2002), sustained the "EEOC regulation stating that an otherwise untimely filed charge of discrimination under Title VII may be verified after filing" but also cited and relied upon *Bihler v. Singer Co.*, 710 F.2d 96, 99 (3d Cir. 1983). Reply Memorandum, JA 287, fn. 3. In that filing, Federal Express also recognizes that the ADEA, 29 U.S.C. § 626(d) provides that "[u]pon receiving such a charge, the Commission shall promptly notify . . . prospective defendants and shall promptly seek to eliminate any alleged unlawful practices . . . " Reply Memo. of Federal Express at notes 3 and 4, JA 287.

Federal Express requested that the Court dismiss the Complaint. JA 36-37. With respect to Kennedy, Federal Express stated that she "has not complied with the 60-day waiting period that is a jurisdictional predicate for suit under the ADEA." JA 297-298.

Federal Express asserted that the events alleged to be discriminatory were "business decisions implemented by FedEx eight years ago," and that "None of the named plaintiffs filed a charge with the . . . EEOC

that can serve as the administrative basis necessary to bring this action and all of the claims are time barred." JA 44. The Memoranda of Federal Express filed in support of the motion did not mention the procedural regulation of the EEOC under the ADEA, 29 C.F.R. § 1626. JA 40-58 at 281-282.

In their memorandum in opposition to the motion, plaintiffs (Respondents here) relied upon the language of the Complaint and the charge of Robertson, filed on December 1, 2000, and on the December 2001 filing of plaintiff Kennedy. JA 180-192. They expressly relied upon the EEOC regulation under the ADEA defining "charge" and they quoted from 29 C.F.R. §§ 1626.6, and 1626.8(b) and argued that Kennedy's December 12, 2001 filing was a "charge" and that the later filed document related back to that date, citing the decision of the Supreme Court in *Edelman v. Lynchburg College, supra.* JA 190-192.

Federal Express, in its Reply Memorandum again failed to discuss the regulation of the Commission under the ADEA defining what constitutes a charge and when a writing addressed to the Commission is considered received, 29 C.F.R. §§ 1626.3, 1626.6, and 29 C.F.R. § 1626.8(b).

By Memorandum and Order filed on October 2, 2002, the district court ruled for Federal Express. JA 299-306. In that decision the district court ruled that although McQuillan and Robertson did file charges in 1998 and in 2000, they were filed too late, namely "nearly four years after implementation of

the policies challenged in this lawsuit" and "over six years after plaintiffs claim the policies were implemented." JA 306.

With respect to Kennedy's charge, the district court ruled [JA 306-307] that:

> Kennedy filed an administrative charge on May 30, 2002. Therefore she failed to meet the requirements of Section 626(d). . . . [the ADEA] specifically requires that a 'charge' be filed prior to the commencing of a civil action . . . If Congress had intended that an intake questionnaire or affidavit constituted sufficient notice to EEOC of alleged discrimination, it could have specifically stated, so but it did not . . . the Kennedy questionnaire and affidavit should not be considered the equivalent of a charge . . . "

In short the District Court ruled that the charges of McQuillan and Robertson were filed too late. JA 306. At the same time the district court ruled that with respect to Respondent Kennedy, the suit was filed prematurely, because the ADEA "requires that a 'charge' be filed with EEOC prior to commencing a civil action, and the charge was not filed until May 30, 2002, approximately 30 days after the suit was filed. JA 307.

Judgment was entered on October 23, 2002 dismissing "plaintiffs' ADEA claims . . . without leave to replead." JA 311. Plaintiffs filed a timely motion to alter or amend on October 24, 2002, which was denied by Order entered on May 5, 2004. JA 7.

3. Proceedings in the Court of Appeals for the Second Circuit Below.

A timely appeal by Plaintiffs-Appellants was filed on June 4, 2004. JA 8.

The Brief of Federal Express Corp. in the Second Circuit did not cite the Regulation under the ADEA, 29 C.F.R. §§ 1626.3, 1626.6 or 1626.8, nor did it discuss the EEOC regulation under Title VII, 29 C.F.R. § 1601.12(b), setting forth what kind of writing is a charge under Title VII and when it is considered received. See the Brief on Appeal of Federal Express, TOC, vii, and B, and Summary of Argument and Argument, at 11-34.

In that Brief, Federal Express acknowledged that "under *Edelman*, a timely but unverified charge can be validated after the expiration of the limitations period" but argued that the "facts and circumstances surrounding the submission of an Intake Questionnaire are necessarily relevant . . . " Brief for Federal Express on Appeal at 20-21. It noted that "At least five circuits have adopted a test of 'manifest intent' to determine whether a non-charge submission to the EEOC constitutes a charge . . . This test is consistent with the letter and spirit of the ADEA and supporting regulations." *Id.* at 21.

Federal Express urged the Court of Appeals below to follow the "manifest intent test" standard for determining what writing, not on a Form 5 Charge, is a "charge" within the meaning of the ADEA and Title VII, and to rule that the Kennedy documents were

not a "charge" because "the record shows no proof that Kennedy took any action to activate the EEOC's machinery . . . " *Id.* at 21-25 (quotation from 23, n. 17, last sentence).[1]

The Second Circuit, per Circuit Judges Kearse, Calabresi and Pooler, in an Opinion by Judge Pooler, reversed the decision of the district court and remanded, Pet. App. B, at 3a-23a.

The Court of Appeals noted that the ADEA requires the filing of a timely charge, but does not define "charge." Pet. App. at 14a. It noted that the EEOC's regulations specify the "requisite information that must appear in a 'charge,'" and what a charge "'should contain'" citing 29 C.F.R. §§ 1626.3, 11626.6 and 1626.8. Pet. App. 14a. The Court of Appeals also ruled that "Kennedy's Questionnaire satisfied the EEOC . . . " regulation. Pet. App. 18a. The Court also noted that "Some Circuits have imposed an additional requirement, the 'manifest intent rule,' that is not explicitly stated in the statute or interpreting regulations." The Court stated that (Pet. App. 15a):

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[1] In that sentence Federal Express fails to note that Mrs. Kennedy filed not only fully executed "Intake Questionnaire" in Dec. 2001 (JA 265, two-page document), but that she filed at the same time a six-page Affidavit which contained all of the information that the EEOC prefers to have (29 C.F.R. § 1626.28(a)), and is subject to penalty of perjury. JA 266-274. In addition, in early February, she again executed the Intake Questionnaire and sent it to EEOC. JA 265. See text above at 304.

> " . . . notice to the EEOC must be of a kind that would convince a reasonable person that the grievant has manifested an intent to activate the Act's machinery."

Bihler v. Singer Co., 710 F.2d 96, 99 (3d Cir. 1983). Pet. App. 14a-16a.

In any event, that court of appeals below ruled that the fully executed Intake Questionnaire and Affidavit of Respondent Kennedy "provided written notice to the EEOC that 'would convince a reasonable person' that Kennedy intended 'to activate the Act's machinery.'" Pet. App. 18a-20a (quote from 19a).

In so ruling, however, the Second Circuit below rejected the argument of Federal Express below that Kennedy's filing was not a charge because EEOC had not treated it as such, and ruled instead that (JA 16a):

> " . . . if an individual satisfactorily notifies the EEOC of her charge, she is not foreclosed from federal suit merely because the EEOC fails to follow through with notifying the employer and attempting to resolve the matter . . . "

SUMMARY OF ARGUMENT

I. The decision of the Court of Appeals below correctly ruled that the writings filed by Respondent Kennedy in early December, 2001 constituted a charge under the lawful regulation of the Commission

promulgated under the ADEA. 29 C.F.R. §§ 1626 and 1628(b) and JA 351 and 352. This Court should affirm the judgment of the Court of Appeals on that ground alone so that claims of all the other respondents can be decided by a jury on the evidence.

Like Title VII, the ADEA requires that a prospective plaintiff file a "charge" before she or he can file suit to enforce the rights granted, and like Title VII, the ADEA does not contain a definition of the word "charge" in its text. A charge is defined under the valid Commission regulations which impose "minimal" requirements (a writing identifying the parties and generally describing the conduct alleged to be discriminatory) on the charging party; and a provision that the charge can be amended and that amendments relate back to the date of the first writing received by the Commission. 29 C.F.R. §§ 1626.6 and 1626.8(b); 29 C.F.R. § 1601.12(b).

Federal Express does not directly challenge the lawfulness of the Regulation, but attempts to avoid its plain language and the consequences. Under the regulation, the Kennedy filing was a charge that tolled any period of limitations, and a charge that preceded the filing of this case by more than four months. The decision of the Court of Appeals should be affirmed on the basis of the regulation. *Edelman v. Lynchburg College*, *supra*, 535 U.S. at 112-120; *Chevron v. Exhazabal*, 436 U.S. 73 (2002).

II. The Commission's failure to treat the Kennedy documents of December 2001 as a "charge" and

"promptly" and to perform the other duties imposed on it by the Act do not diminish the rights of the charging party to have her claims determined on their merits. *Love v. Pullman Co.*, 404 U.S. 522, 527 (1972) (procedural technicalities outside the control of the plaintiff not favored); *Oscar Mayer & Co. v. Evans*, 441 U.S. 750, 761 (1979); *Edelman v. Lynchburg College*, *supra*, 300 F.3d at 404-405; *LaQuaglia v. Rio Hotel & Casino*, 186 F.3d 1172, 1175-1176 (9th Cir. 1999). The Court should hold, consistent with the language of 29 U.S.C. § 626(d), that a "charge" is filed if it complies with EEOC regulations, even if EEOC fails to act on the charge.

Such holding will effectuate the charge filing provisions of the ADEA which were adopted in 1978 Amendments to the Act. The Amendments were intended to prevent dismissal of cases on technical grounds so that older employees would have a chance to prove the merits of their claims. Sen. Rep. 493, 95th Cong. 1st Sess. 12 (1977). Federal Express provides history quotations from the legislative history of the 1967 Act. Brief for Petitioner at 13-15. Those materials are not relevant, because the "charge" requirements were not in the Act before 1978. See also, pages 21 to 22.

The Commission's regulation provides an objective and easily understood standard for determining when a writing is a charge. 29 C.F.R. §§ 1626.6 and 1626.8(b). Under that standard a document is a charge if it identifies the employer and the charging party, and if it alleges generally the nature of the

discriminatory practice of conduct. There is no doubt that the Kennedy filing satisfied that standard. In those few situations where there may be some ambiguity, the Commission should provide notice to the employer promptly, unless the author of the writing expressly instructs the Commission not to do so.

III. Petitioner Federal Express urged the Court of Appeals below to affirm the district court ruling with respect to Respondent Kennedy because her writings failed to demonstrate that she had a "manifest intent" to have the Commission commence proceedings.

The Court of Appeals below applied the manifest intent standard as requested by Federal Express. It concluded "that Kennedy provided written notice to the EEOC that would convince a reasonable person that Kennedy intended to activate the machinery" and that EEOC erred by failing to act in response to the Kennedy's manifested intent. Pet. App. 19a.

If the Court does reach the issue of manifest intent, Respondents believe the decision of the court of Appeals below should be sustained because Kennedy's writings not only met the minimal standard of the Regulation set forth in 29 C.F.R. §§ 1626 and 1626.8(b), JA 351-352, but contained all of the information the Commission desires to have in a charge (29 C.F.R. § 1626.8(a), and JA 352), and went beyond that standard by filing the Form 283 both in December 2001 and February 2002, and by submitting a

writing under penalty of perjury. *Edelman v. Lynchburg College*, 535 U.S. 106, 114 (2002).

ARGUMENT[2]

I. THE REGULATION OF THE COMMISSION DEFINING WHEN A CHARGE IS SUFFICIENT UNDER THE ADEA IS LAWFUL AND THE KENNEDY FILINGS CONSTITUTE A CHARGE AS SO DEFINED.

A. The Regulation of the Commission under the ADEA provides that "A charge shall be in writing and shall name the prospective respondent and shall generally describe the discriminatory acts." 29 C.F.R. § 1626.6. JA 351. It also provides that "a charge is sufficient when the Commission receives from the person making the charge . . . [such] a written statement, and that any amendment shall relate back to the date the document was first received." 29 C.F.R. §§ 1626.8(b) and (c). JA 352.

[2] Federal Express has not challenged in this Court the ruling of the Court of Appeals below that held the district court had erred in granting the motion to dismiss, and reinstating the claims of Robertson and McQuillan. Pet. App. 21a-22a; Petition and Brief of Federal Express. Rather, Federal Express contests only the right of Kennedy to be a plaintiff. Federal Express Brief at 5-31. This Brief is accordingly based upon the understanding that the rights of Robertson and McQuillan to proceed are to be determined by the district court after remand, and regardless of this Court's decision.

This Court ruled in 2002 that the relation back regulation of the Commission under Title VII is lawful and binding. *Edelman v. Lynchburg College*, 535 U.S. 106, 108-110 and 118-119 (2002). That regulation provides (29 C.F.R. §§ 1601.12(b) and 12(c)) that:

> . . . a charge is sufficient when the Commission receives from the person making the charge a written statement sufficiently precise to identify the parties, and to describe generally the action or practices complained of . . . amendments. . . . will relate back to the date the charge was first received . . .

The charge filing provisions of the ADEA, 29 U.S.C. §§ 626(d) and 633(b), JA 345-50, were adopted in March 1978, and were modeled after the charge filing provisions of Title VII. *Trans World Airlines, Inc. v. Thurston et al.*, 469 U.S. 111, 121 (1985). In 1965 the procedural regulation of the EEOC under Title VII provided that "a charge that any person has engaged in or is engaging in an unlawful employment practice within the meaning of Title VII may be made by a person claiming to be aggrieved." 1966 Fed. Reg. 227, 228, 29 C.F.R. § 1601.6. That regulation also provided that a charge shall be in writing and sworn. *Id.* at 228, See 29 Fed. Reg. 1601.8.

By some time in 1966, the Commission adopted the relation-back regulation under Title VII, 29 C.F.R. § 1601.12(b) in terms substantially like the language now in that provision. *Edelman v. Lynchburg College*, *supra*, 535 at 117-118.

The procedural regulation of the Commission under the ADEA, quoted above at 18-19, was published for comment in Jan. 1981 and was adopted in Jan. 1983. 46 Fed. Reg. 9970 and 48 Fed. Reg. 138. The ADEA regulation of the Commission uses substantially the same language as the earlier issued Title VII regulation with a minor exception.[3]

The Commission "regulation of procedure" under the ADEA is authorized by Section 30 of the ADEA, 29 U.S.C. § 628. That provision authorizes the Commission "to issue such regulations as it may deem necessary or appropriate" pursuant to the provisions of the Administrative Procedures Act. The Court of Appeals below correctly ruled that the Kennedy documents filed with the Commission in early December, 2001 was a "charge" as defined by Regulation. Pet. App. at 18a; 29 C.F.R. §§ 1626.6 and 1626.8(b). The Court of Appeals so ruled. Pet. App. 18a.

Federal Express does not challenge the validity of the Regulation of the Commission under the Act nor does it attempt to explain why the Kennedy documents submitted to EEOC in December, 2001 did not comply with 29 C.F.R. § 126. Federal Express below argued that the "manifest intent" test recognized by

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[3] The ADEA regulation permits the filing of charges "received in person or by telephone . . . " but such charges "shall be reduced to writing." JA 351 and 352. That exception is mandated by the language of the ADEA which does not require writing, or the oath or other verification required by Title VII.

some of the courts of appeals should be adopted by the Second Circuit, and that under that test Kennedy's documents had not shown a "manifest intent" to activate the machinery of the Commission. Brief of Appellee, Federal Express at 17-25.

The Court of Appeals below not only ruled that "Regardless of what the EEOC communicates, or fails to communicate . . . a written filing that complies with the ADEA and contains the information required by EEOC's interpreting regulation is a charge as long as it demonstrates a party's intent to activate the administrative process." Pet. App. 19a. In effect, the Opinion on appeal below held that a document other than a Form 5 charge is a charge under the Act if it contains the information required by 29 C.F.R. § 1626, unless something written in that document shows an intent not to so proceed. Pet. App. 19a-20a.

In this Court Petitioner Federal Express argues that "The plain text of [29 U.S.C.] 626(d) makes clear that a 'charge' is a document that triggers the EEOC's mandatory duties of providing notice and initiating conciliation" so that "An intake questionnaire that is not treated as a charge by the EEOC . . . can never constitute the 'charge' that must be filed under the ADEA." Brief of Petitioner at 11. In short, Federal Express argues that an employee or other "aggrieved individual" who has provided all of the information necessary to EEOC to enable it to determine whether or not it will bring its own suit against the employer within 60 days, is barred from bringing suit because of EEOC's failure to take action promptly.

That argument is an abrupt departure from the language of the ADEA, the decisions of the Court, and from the intent of Congress in 1978, when the Amendments enacted that year borrowed from Title VII the charge filing procedures. *Oscar Mayer & Co. v. Evans*, 441 U.S. 750, 756 (1979).

For more than thirty years this Court has recognized that the charging party's right to file a suit is not defeated by EEOC's failure to follow its obligations to acknowledge receipt of the charge and to notify the applicable state agency promptly of the filing of the charge. *Love v. Pullman Co.*, 404 U.S. 522, 525-526 (1972) (EEOC's failure to treat a letter as a formal charge promptly, while holding it in abeyance, is not a bar to the charging party's suit, where the employer "makes no showing of any prejudice to its interest.").

In the Court of Appeals below, Federal Express recognized that this Court recently ruled that EEOC's "relation-back" regulation under Title VII is valid and that under that regulation a later filed charge or amendment to the charge can be cured or otherwise amended, and as a party to this Court can do under Rule 15 of the Federal Rules; and that any such amendment relates back to the date of the filing of an informal document such as a letter. Federal Express Brief on Appeal in the Second Circuit, at pp. 17-19, citing and discussing *Edelman v. Lynchburg College*, 535 U.S. 106, 118-119 (2002). Such a reading of Title VII is faithful to the text of Title VII, because the provisions of Title VII requiring the Commission to

provide notice to the employer or other respondent do not define the word "charge" expressly or by implication.

In *Edelman v. Lynchburg College, supra*, this Court sustained the lawfulness of the Commission Regulation under Title VII which provides that "a charge is sufficient when the Commission receives from the person making the charge a written statement sufficiently precise to identify the parties and to describe generally the action or practices complained of." 535 U.S. at 110.

In that case, the letters from the plaintiff to the Commission were within 300 days of June 6, 1997, the date on which he was denied tenure, but his formal charge was not filed with the Commission until April 15, 1998, more than 300 days after the allegedly discriminatory conduct. *Id.*

The Court relied upon the line of cases holding that Title VII has "a remedial scheme in which lay persons, rather than lawyers, are expected to initiate the process." 535 U.S. at 115. The Court sustained the regulation in part because "the lay complainant, who may not know enough to verify on filing, will not risk forfeiting his rights inadvertently." *Id.*

Just as the regulations of the Commission control whether a "charge" is timely for purposes of the civil action provision of Title VII, so too the regulations of the Commission control whether a "charge" is timely for purposes of bringing a private action under the ADEA. 29 U.S.C. § 626(d). The legislative history of

§ 626(d) leaves no doubt that Congress intended such a result. Indeed, the ADEA, places less emphasis on the formal requirements for a charge than Title VII: the ADEA does not require a sworn, written statement and it has no "right to sue letter" prerequisite to private suit. The plain language of the statute and the regulation, together with the precedent in *Edelman* support the ruling below.

The National Labor Relations Act has required the filing of a "charge" at least since 1946, but that Act also requires that the charging party serve a copy of the charge upon the person against whom the charge is made, "unless the person aggrieved thereby was prevented from filing the charge by reason of service in the armed forces." Section 10(b), 29 U.S.C. § 9(c).

Congress adopted Title VII of the Civil Rights Act of 1964 less than 20 years after it adopted the NLRA. While it borrowed those words "charge" and "individual aggrieved," however, Congress chose not to place the responsibility for making service on the employee or other person aggrieved as it had done under the NLRA.

Congress chose instead to provide that "the Commission shall serve a notice of the charge . . . upon the employer . . . within ten days . . . and shall make an investigation thereof." Section 706(b), 29 U.S.C. § 2000e-5(b).

Similarly, in the ADEA, Congress limited the responsibility of a person filing a timely "charge

alleging unlawful discrimination with the EEOC." Section 7(d), 29 U.S.C. § 628(d)(1), and then waiting for at least sixty (60) days before filing suit. Under the ADEA, the "Commission shall promptly notify all persons named in the charge as prospective defendants . . . and shall promptly seek to eliminate any unlawful conduct practice by informal means. . . ." Section 7(d), 42 U.S.C. § 628(d)(1).

To argue that the aggrieved individual or charging party has the duty to notify the employer of the filing of the charge is contrary to the plain language of the ADEA as quoted above which places that responsibility on the "Commission".

Prior to the 1978 amendments to the ADEA, the Act stated "No civil action may be commenced by an individual under this section until the individual has given the Secretary not less than sixty days notice of an intent to file such an action." *Oscar Mayer & Co. v. Evans*, *supra*, 441 U.S. at 762, fn. 9. As originally enacted by Congress in 1967, the ADEA provided that a suit could not be commenced "by an individual under this section until the individual has given" at least 60 days notice to the Secretary of Labor of his intent to sue. Pub. L. No. 202, 81 Stat. 602, 605 (1967).

In 1978, Congress sought to facilitate the ability of individuals to bring suit once an employee has filed a charge and waited for the time specified in the law before filing suit. In that year, Congress removed the requirement that the individual bringing suit must

file a notice of intent to sue, and in its place adopted the current language of the ADEA that provides that a suit may not be brought until 60 days after "a charge alleging unlawful discrimination has been filed. . . ." Pub. L. No. 95-256, Section 4(1), 92 Stat. 189, 190 (1978).

In adopting that amendment, Conference Report on the 1978 Amendment (March 14, 1978) noted H. R. Conf. Rept. 965 at 8 that :

> . . . the conferees intend that the charge requirements will be satisfied by the filing of a written statement that identifies the potential defendant and generally describes the action believed to be discriminatory.

Congress noted that "Failure to timely file notice [of intent to sue was] the most common basis for dismissal of ADEA law-suits" and the purpose of the amendment was "to make it more likely that the courts will reach the merits of the cases of aggrieved individuals . . . " S. Rep. No. 493, 95th Cong. 1st Sess. 12 (1977), U.S. Code Cong. & Admin. News 1978, 504, 515.

By grafting the charge language of Title VII onto the ADEA – without the notice to employer requirements of the NLRA – Congress made it clear that the 1978 Amendment to § 626(d) was not intended to define a "charge" by its success in causing notice to the employer. By referencing the minimal standards of the Title VII charge regulations, the Conference

Report lends strong support for the Commission decision to adopt similar standards under the ADEA.

Indeed, the scheme of the ADEA offers even less reason than Title VII to impose a formalistic standard for the filing of charges. Under the ADEA there is no definition of the word "charge" in Section 11, 29 U.S.C. § 630 or elsewhere in the text of the Act. See 29 U.S.C. § 626(d) and (e); see also *Diez v. Minnesota Min. and Mfg. Co.*, 88 F.3d 672 (8th Cir. 1996), relied upon by Federal Express below (Brief of Appellee 22-23, and 29-30), and here (Brief at 21 and 28). Similarly, there is no definition of charge in Title VII. See *Edelman v. Lynchburg College, supra*, 535 U.S. at 112.

Title VII requires verification of a charge, Section 706(e)(1), 42 U.S.C. § 2000e-5(e)(1).

> Unlike Title VII, the ADEA does not require that a charge be verified. The only statutory reference to what might be necessary to be a charge comes in 29 U.S.C. 633(b). . . . Section 633(b) at least implies that charges in general shall be subject only to the minimal requirements that they be written and signed statements of the relevant facts.

Diez v. Minnesota Min. and Mfg. Co., 88 F.3d 672, 676 (8th Cir. 1996).

Title VII requires a "right to sue" letter before a private action can be filed. 42 U.S.C. § 2000e-5(f)(1). The ADEA has no such requirement. See, Section 7(d) 29 U.S.C. §§ 626(d) and (e). Moreover, the ADEA has

a provision that while the Commission may bring suit to enforce the Act "the right of any person to bring such action shall terminate upon the commencement of an action by the . . . Commission to enforce the right of such employee under this chapter." Sections 7(c)(1), 626(c)(1). In contrast, under Title VII, the person or persons aggrieved shall have a right to intervene in a civil action brought by the Commission or the Attorney General . . . Section 706(f)(1), 42 U.S.C. § 2000e-5(f)(1). The need for action by the Commission under the ADEA is thus less than under Title VII.

"The purpose of the charge filing requirement is fully served by an administrative claim that alerts the EEOC to the nature and scope of the grievance . . . " *Tolliver et al. v. Xerox Corp.*, 918 F.2d 1052, 1056 (2d Cir. 1990), *cert. den.*, 499 U.S. 983. For EEOC is the agency that can file suit to enforce the claims of employees of private employers and providing EEOC with such notice assures that the private suit will not be rendered unnecessary by a suit by EEOC.

Under the ADEA, the only responsibility that Congress has placed on the aggrieved individual is to file a timely written or oral complaint with the Commission or an agent of Commission, Section 7(d), 29 U.S.C. § 626(d). Under the ADEA, as under Title VII, the responsibility of notifying the parties and attempting to eliminate any unlawful practice is on "the Commission." 29 U.S.C. § 626(a). JA 347.

II. THE FAILURE OF THE COMMISSION TO NOTIFY FEDERAL EXPRESS PROMPTLY OF THE KENNEDY FILING DOES NOT LESSEN HER RIGHTS OR THE RIGHTS OF THE RESPONDENTS TO PROSECUTE THIS ACTION UNDER THE ADEA.

Federal Express argues here that no "charge" is filed unless the Commission duty "upon receipt of a charge" is "to promptly notify the persons named in such charge . . . and promptly seek to eliminate any unlawful practices." Brief on the Merits at 11-15. Under such a rule the determination whether a "charge" has been filed does not depend upon the content of the filing, but solely upon the Commission's compliance with its duty to act "upon receipt of a charge." Federal Express Brief at 11-15. The Brief states (at 11): "An intake questionnaire that does not yield notice an attempt at resolution cannot be a charge."

That argument is inconsistent with the language of the ADEA, inconsistent with this Court's decisions in *Love v. Pullman Co., supra*, 404 U.S. at 618-619; and with *Edelman v. Lynchburg College, supra*. The position of Federal Express quoted above is also inconsistent with the prior decisions of the Third, Fourth, Fifth, Seventh, Eighth, Ninth, Tenth and Eleventh Circuits.[4] Indeed, the logic of that argument is that the

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[4] *LaQuaglia v. Rio Hotel and Casino, Inc.*, 186 F.3d 1172, 1175 (9th Cir. 1999).

regulation defining an ADEA "charge" by its content are unauthorized and unlawful because the regulation recognizes that after the charge is filed, the Commission must serve notice promptly. 29 C.F.R. § 16.

But in the Court of Appeals below, Federal Express explicitly declined to challenge the lawfulness of the Regulation, and did so again in its Petition. Accordingly, Federal Express cannot do so in its Brief on the Merits. And it does not assert the unlawfulness of the Commission's regulation under the ADEA in this Court.

Here, as in *Love v. Pullman Co., supra*, the employer made "no showing of prejudice to its interests." 404 U.S. at 619. Moreover, here as in that case,

> " . . . to require a second filing by the aggrieved party would serve no purpose other than the creation of another procedural technicality. Such technicalities are particularly inappropriate in a statutory scheme in which laymen, unassisted by trained lawyers, initiate the process."

Love v. Pullman Co., supra, 404 U.S. at 119.

Federal Express also argues that "Congress intended employers to have notice . . . " of the charges and the opportunity to reach a settlement with the charging party.

No doubt, but Congress conferred on the Commission to perform the statutory duties "promptly." There is no hint in the statute or in the legislative

history of Section 626(d) or in the legislative history of the ADEA's charge filing procedure that Congress believed that the charging party who has submitted a writing to EEOC with all of the information it needs or seeks under the Act, and in addition a five page Affidavit, should be deprived of her rights to bring suit because of the actions or inactions of the EEOC.

This Court and other appellate courts that have addressed the issue have ruled that the charging party should not be penalized because of the failure of the Commission to perform its duties under the Act and under its Regulations promptly. *Love v. Pullman, supra; LaQuaglia v. Rio Hotel & Casino, Inc.*, 186 F.3d 186 (9th Cir. 1999) (the right of a claimant is not dependent upon "scrupulous compliance [by EEOC] . . . otherwise, claimants with meritorious claims might be denied relief as a result of bureaucratic mix-ups", citing *EEOC v. Techalloy Maryland, Inc.* 894 F.2d 676, 679 at fn. 4 (4th Cir. 1990); *Edelman v. Lynchburg College,* 300 F.3d 400, 404-405 (4th Cir. 2002).

The Eleventh Circuit in *Bost v. Federal Express, supra*, 372 F.3d at 1239-1240, acknowledged the existence of the Commission's regulation. 372 F.3d at 1238-39. However, that Court did not set forth any reason for believing or suggesting that Commission's regulation, 29 C.F.R. § 1626, was inapplicable or invalid. 372 F.3d at 1240-1241. In so granting the motion to discuss under Rule 12(b)(6), it relied upon the "undisputed evidence" and the "manifest intent" standard, before permitting any discovery. 372 F.3d at

1240-1241. Nor did that decision discuss why the "relation-back" portion of the regulation, 29 C.F.R. § 1626.8(b), of the regulation should not cure any defect in the charge filed by *Bost*.

That decision was based in part upon the view of the Eleventh Circuit that "The ADEA requires that an individual exhaust available administrative remedies with the EEOC before filing suit." 372 F.3d at 1238. That decision preceded the ruling of this Court in *Woodward v. Ngo,* 126 S. Ct. 2378, 2390-91 (2006), which noted the charge filing provision at issue of the ADEA and Title VII did not require exhaustion of administrative remedies.

A ruling that a charging party's statutory right is barred or diminished because of the unexplained or arbitrary failure of a government agency to perform its statutory duties promptly would raise a serious question of constitutional law. *Logan v. Zimmerman Brush Co.,* 455 U.S. 422, 434 (1982); *Tulsa Professional Collection Services, Inc. v. Pope,* 485 U.S. 478, 485 (1988). There should be no such issue here, because the intent of Congress was to authorize an individual to file suit after filing of a "charge" and authorized the Commission to issue lawful regulations, and the applicable regulation issued by the Commission is controlling and governing.

Indeed, in the Court of Appeals below, Federal Express noted that " . . . FedEx has never argued that the EEOC's failure to treat a questionnaire as a charge – standing alone – is dispositive . . .

treatment by the EEOC may be beyond a plaintiff's control." Brief of Federal Express as Appellee, at 23, n. 17. It then added "Here however, the record shows no proof that Kennedy took any action to activate the EEOC's machinery and she therefore cannot complain . . . " *Id.* In this case, Federal Express filed a motion to dismiss before filing an Answer, and the district court granted that motion before Answer, and therefore before discovery.

That position of Federal Express in this Court not only fails to recognize that as Appellee in the Court of Appeals below, Federal Express was seeking to affirm an order that granted a motion to dismiss under Rule 12 and that a

> . . . court may dismiss a complaint only if it is clear that no relief could be granted under any set of facts consistent with the allegations . . .

Hishon v. King & Spalding, 467 U.S. 69, 73 (1984); and *Swierkiewicz v. Sorema, NA,* 534 U.S. 506, 514 (2002).

Federal Express also fails to recognize that Respondent Kennedy filled out completely and signed a two page questionnaire which itself contained more information than required by the EEOC. She also typed and had notarized a five page detailed Affidavit stating the surrounding facts in even more detail and sent it to EEOC. In addition, in February, 2002, after about 60 days of apparent inaction by EEOC, she executed the completed Questionnaire again on

February 3, 2002 and sent it again to EEOC. Ms. Kennedy presumably did not ask for a Form 5 charge in 2001, because she was a layperson who was not familiar with the forms used by EEOC in 2001 and 2002.

Federal Express states in its Brief (fn. 10) that "Congress structured the ADEA so that EEOC will play a significant role in preventing and resolving claims of age discrimination. . . ." The EEOC does play a critical role, both by promulgating regulations setting forth the procedures to be followed, but also by seeking conciliation where feasible, and by bringing suits of its own.

EEOC attempts to resolve such claims within the 60 days set forth in the language of the Act. But Congress expressly granted private parties the right to bring suit after the 60 day period has expired, because it recognized that there are many charges which the Secretary of Labor could not, or did not wish to pursue and the EEOC cannot or does not wish to pursue in court, which cannot be resolved within that limited period of time, given the quantity of charges it receives and its limited budget. Unlike Title VII, in which an employee usually needs to receive a right to sue letter before bringing suit, the ADEA requires nothing of the agency except that it notify the employer or other respondent of the filing of charge. Its failure to do so promptly cannot and should not be attributed to any action or failure to act on the part of the charging party who filed a timely

charge under the plain language of the Regulation of EEOC. 29 C.F.R. § 1626; 29 U.S.C. §§ 626(c) and (d).

Contrary to the assertions in the Brief of Federal Express, Section 7(d) of the ADEA does not require the charging party or other prospective plaintiff to file any document of her or his own after others have filed a charge, but only requires that "No civil action may be commenced until 60 days after a charge has been filed." 29 U.S.C. § 626(d). It also provides that such a suit in New York and other states that have laws prohibiting age discrimination should not be filed "'before the expiration of 60 days *after proceedings have been commenced* under the State law.'" *Woodford v. Ngo,* 126 S. Ct. 2378, 2390 (2006) (italics as in that decision).

The ADEA permits non-filing employees to bring or join in a suit although they did not file a charge. Accord: *Tolliver et al. v. Xerox Corp.,* 918 F.2d 1052, 1057 (2d Cir. 1990).

By providing in the text of the ADEA, as incorporated from the Fair Labor Standards Act, 29 U.S.C. § 216(b) that "'employees may sue on behalf of . . . themselves and others similarly situated' . . . Congress has stated its policy that ADEA plaintiffs should have the opportunity to proceed collectively." *Hoffman-La Roche, Inc. v. Sperling, et al.,* 493 U.S. 165, 169 (1989).

> A collective action allows age discrimination plaintiffs the advantage of lower individual costs to vindicate rights by the pooling of

> resources. The judicial system benefits by efficient resolution in one proceeding of common issues of fact and law arising from the same alleged discriminatory activity.

This suit was properly brought to obtain those benefits to the Respondents and to the judicial system. There was and is nothing inconsistent with the intent of Congress in so doing.

The Brief of Petitioner cites the legislative history of the ADEA in 1967. Brief of Petitioner Federal Express at 12-15. Even prior to 1978, this Court had recognized that the defaults of state governmental agencies do not bar the claims of an individual to bring suit under the ADEA. *Oscar Mayer & Co.,* 441 U.S. 750, 662 (1979). Similarly, this Court had earlier ruled that delays by the Commission do not bar the right to prosecute a suit to enforce Title VII. *Love v. Pullman, supra.*

The language and intent of the Congress in 1977 and 1978 about charge filings are critical to the issue presented in this case because the ADEA did not use the word "charge," prior to that time.

As noted above (see page 27), the charge filing provisions of the ADEA added to the Act by the 1978 amendments to the Act were adopted in March, 1978. Pub. L. 95-256, 92 Stat. 3781. See, *Oscar Mayer & Co. v. Evans, supra,* 441 U.S. at 764, fn. 11, citing *Love v. Pullman Co., supra.*

Congress adopted the 1978 Amendments in March of that year. 92 Stat. 3781. Congress utilized

the Title VII charge filing procedure, with several significant modifications, all of which appear meant to maximize the chances that lay persons could file a charge without the need to obtain the advice of counsel.

Congress noted that "Failure to timely file the notice [of intent to sue] . . . was the most common basis for dismissal of ADEA law-suits by private individuals." Sen. Report 493, 95th Cong., 1st Sess., 12 (1977). It noted that the purpose of the amendment was "to make it more likely that the courts will reach the merits of aggrieved individuals." *Id.*

Petitioner argues without supporting relevant data that EEOC's work load would increase if a Form 283 charge of the kind filed by Respondent Kennedy is a charge within the meaning of the regulations.

It does not compare the number of charge filings per year before 1983 or so when current regulations under the ADEA were adopted with earlier years when those regulations did not exist. Instead it conjectures "that since 1997, EEOC has processed between 75,000 and 80,000 charges per year, which, one may surmise, is a small fraction of the number of completed intake questionnaires and other inquiries the agency receives each year." Brief at 22. By inclusion of the words "other inquiries" Federal Express is mixing charges and non-charges. Such a non-comparison is useless.

Nothing in this record shows or suggests that treating the intake questionnaire as a charge will

allow for slower processing of the charge, with notice to the employer or other respondent. On the contrary, once the law is clarified by a ruling of this Court, the Commission will accept the documents as charges, which is likely to lead to earlier notification of the employer. Moreover, continued recognition by this Court of the opt-in procedures of the ADEA will lead to more suits by groups of older plaintiffs, with the increased judicial efficiency described in *Hoffman-La Roche v. Sperling, et al., supra,* 493 U.S. at 170.

A procedure of the ADEA that was modeled upon and based on the Fair Labor Standards Act, namely the procedure that any person aggrieved by the same or similar alleged discriminatory conduct of the employer may join a suit without payment of fees by "opting in" to it. See, Section 16(b) of the Fair Labor Standards Act, 29 U.S.C. § 216(b), which is incorporated by Section 7 of the ADEA, 29 U.S.C. § 626(b). That provision specifies that "No employee shall be a party plaintiff unless he gives his consent in writing to become such a party, and such consent is filed in the court in which such action is brought." 29 U.S.C. § 216(b), incorporated by 29 U.S.C. § 626(b). *Hoffman-La Roche v. Sperling, supra.*

The charges filed by Kennedy in December 2001 and February 3, 2002 stated expressly that "Fed Ex began to target me and other more senior and older employees . . . Federal Express continues to grant preference to young employees . . . Older couriers are disciplined or threatened with discipline for minor or invented infractions . . . while younger workers

engage in such conduct without issue. . . ." JA 389. Suit was filed on behalf of the fourteen plaintiffs and "others similarly situated." JA 29-30.

In this case Kennedy could have joined the suit filed by Robertson and McQuillan as a matter of statutory right. 29 U.S.C. §§ 216(b) and 626(b). However, given that she had provided a writing containing all of the information sought by EEOC in a charge more than 150 days before the suit was filed, she had a right to participate in the collective action as an original party plaintiff because she served her Affidavit Form 28 on EEOC in December 2001 and her Form 283 again on EEOC in early February, 2002, and the suit was not filed until May 30, 2002. JA 265 (2 pages, fold out); and JA 389.

III. IN ANY EVENT THE COURT OF APPEALS PROPERLY CONCLUDED THAT "THE EEOC ERRED IN FAILING TO ACT IN RESPONSE TO KENNEDY'S MANIFEST INTENT."

The Opinion of the Court of Appeals below (Pet. App. 4a-23a) expressly adopts the "manifest intent" test used by several courts of appeal that was urged below by Federal Express. Brief of the Appellee at 21-25. Holowecki et al. as Appellants below argued that "the 'manifest intent' approach is contrary to the governing language of EEOC and to the intent of Congress and . . . is contrary to law." Brief of Appellants at 29. Appellants argued however, that if the

Court were to accept that theory, " . . . Kennedy stated her claim in a manner and desire to complain to EEOC about Federal Express's conduct toward her . . . and to seek the assistance of EEOC in obtaining relief as soon as possible" and that she " . . . . exposed herself to retaliation as surely as if she had filed suit against that company." Brief of Appellants at 29-30.

Respondents Holowecki et al. adhere to the position below and they urge this Court to give full effect to the valid regulation of the EEOC by reviewing the adequacy of the information contained in the initial document, and holding that the Kennedy filing of December 2001 constitutes a charge. 29 C.F.R. §§ 1626.6 and 1616.8(b).

Under that Regulation no further intent need be shown, because if the initial document received by EEOC has the information required by the Commission in 29 C.F.R. §§ 1626.6 and 1626.8(b), no additional information is needed by EEOC to perform its duties promptly. See *Tolliver et al. v. Xerox Corp.*, 918 F.2d at 1056.

In the Court of Appeals below, Federal Express urged "acceptance of the 'manifest intent' test." Federal Express now acknowledges that such a "test . . . is an invitation for mischief and . . . too unclear to be workable." Brief of Federal Express on the Merits, 29-31. Federal Express had also urged the Eleventh Circuit to accept the "manifest intent" test in *Bost, et al. v. Federal Express Corp.*, 372 F.3d 1233 (11th Cir. 2004), and that court did so.

In its Brief on the Merits, Federal Express now urges this Court to reverse the decision of the court of appeals below because it followed the "test" of "manifest intent" although Federal Express argued to the court of appeals below as the appropriate standard. This Court should reject the argument of the Petitioner who urges a theory or standard upon the Court of Appeals, but then asks this Court to reverse the Court of Appeals below because that court followed that standard, but applied it in a manner contrary to Petitioner's intent.

CONCLUSION

For the reasons set forth above, this Court should rule that the procedural regulation of the Commission under the ADEA, 29 C.F.R. § 1626, is valid and controlling as to when a writing is a charge for purposes of the ADEA and should affirm the judgment below.

Respectfully submitted,

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